BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT E. BOSSING Claimant	)	
VS.	)	
GNB BATTERY TECHNOLOGIES Respondent	)	Docket No. 256,607
AND	)	
ZURICH US INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 30, 2005 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on January 10, 2006.

APPEARANCES

Stephen C. Mayer of Kansas, Missouri, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant suffered a neck injury at work that ultimately resulted in a cervical diskectomy and fusion. After the surgery claimant returned to work for respondent until the plant closed. The parties could not agree on the nature and extent of claimant's disability. The Administrative Law Judge (ALJ) found the claimant was entitled to a 57.85 percent work disability based upon a 100 percent wage loss and 35.7 percent task loss with a 10 percent deduction for a preexisting impairment.

The respondent requests review of the nature and extent of claimant's disability. The respondent argues claimant failed to make a good faith job search. Accordingly, respondent argues a wage should be imputed to claimant and further argues because that wage would be within 90 percent of claimant's pre-injury wage the claimant should be limited to his functional impairment. Because claimant had undergone a neck surgery before this accident, respondent also argues claimant had a 12.5 percent preexisting impairment which should be deducted from his current 25 percent functional impairment. Respondent requests the Board to modify the ALJ's Award to find claimant is limited to a 12.5 percent functional impairment.

The claimant argues he made a good faith job search and is entitled to a work disability. Claimant further argues that after his previous neck surgery he had been asymptomatic for years and had no preexisting impairment. In the alternative, claimant argues that his ratable preexisting impairment was 10 percent and requests the Board to affirm the ALJ's Award.

The issue for Board determination on review is the nature and extent of claimant's disability. Resolution of that issue requires determination of whether claimant made a good faith job search, if not, the wage that should be imputed, the task loss and finally the percentage of preexisting impairment, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant injured his neck on January 31, 2000, while pushing batteries on a table with rollers. After conservative treatment failed to resolve his pain complaints the claimant was referred to Dr. Frank Coufal. An MRI scan, dated April 3, 2000, revealed that claimant's prior fusion at C5-6 was solid but claimant had a disk herniation at C6-7. On May 9, 2000, Dr. Coufal performed an anterior cervical diskectomy and fusion at C6-7 on claimant. The doctor released claimant to return to light-duty work on October 30, 2000. Claimant was restricted from lifting greater than 30 pounds with no lifting from floor level nor overhead reaching or lifting activities.

Claimant returned to light-duty work for respondent until the plant closed on November 30, 2000. Because of his restrictions claimant's light-duty work activities consisted of sweeping floors. Claimant then began a job search in December 2000. He testified he applied at numerous businesses and provided lists of businesses where he had applied for work. He further noted that the lists only detailed a portion of the establishments that he had contacted seeking employment. Unfortunately, claimant failed to establish how many contacts he made that were not listed on the exhibits offered at the regular hearing. Moreover, on cross-examination claimant contradicted his earlier

testimony and indicated the lists contained the names of all the places he had contacted in his job search and that he averaged one contact a week. There were also several months that claimant made no job search. Although claimant explained that a death in the family interrupted his job search for a month, he did not explain why he later discontinued his job search for an additional three months.

Claimant was examined by Dr. James S. Zarr, board certified in physical medicine and rehabilitation and electrodiagnostic medicine, on August 29, 2001, at the respondent's request. Dr. Zarr rated claimant, using the AMA *Guides*[1], giving claimant a 25 percent whole person impairment. The rating included all preexisting conditions in claimant's neck. Dr. Zarr testified:

> Q. And what did you find?
>
> A. Using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, I considered him a category IV on page 104, which renders a 25 percent whole body permanent impairment rating.
>
> Q. All right. Doctor, that rating, does that - - or did you take into account any preexisting impairment in Claimant's neck?
>
> A. That 25 percent is how he was for all conditions up to that point in time.[2]

Claimant was examined by Dr. P. Brent Koprivica, board certified in emergency medicine, preventive medicine and occupational medicine, on February 16, 2001, at claimant's attorney's request. Dr. Koprivica rated claimant, using the AMA *Guides*, giving claimant a 25 percent whole person impairment.

Both Drs. Zarr and Koprivica opined that as a result of his previous surgery the claimant had a preexisting impairment that ranged between 10 and 15 percent. Dr. Koprivica testified:

> Q. Okay. So from the prior surgery, you would have at least a ten percent preexisting impairment; would that be fair?
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> A. Using the Fourth Edition of the Guides, I would tell you that a range from 10 to 15 percent would be what would be reasonable.[3]

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] Zarr Depo. at 13-14.

[3] Koprivica Depo. at 40.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[4]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides*, if the condition is addressed by those *Guides*.[5]

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

The claimant had a prior surgery at C5-6 with fusion. Dr. Zarr concluded that pursuant to the AMA *Guides* such a surgery would be ratable at 10 to 15 percent. Dr. Koprivica likewise opined that claimant's prior surgery would be ratable pursuant to the AMA *Guides* in a range from 10 to 15 percent. The Board finds claimant had a preexisting 12.5 percent functional impairment.

Claimant has sustained a cervical spine injury. Consequently, claimant's permanent disability compensation is governed by K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a**

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[4] K.S.A. 44-501(c) (Furse 2000).

[5] See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001).

> **percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that the post-injury wage should be based upon the worker's retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

And the Kansas Court of Appeals in *Watson*[9] held that failing to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

Whether a worker has made a good faith effort to find appropriate employment is a question of fact that is decided on a case-by-case basis. The Board concludes claimant has failed to prove that he made a good faith effort to find appropriate employment after recovering from his cervical spine surgery. The medical evidence establishes that claimant's cervical spine injury does not prevent him from working. Claimant made an effort to find employment but it was limited to an average of one contact per week which ultimately was reduced to a few contacts per month and finally some months claimant failed to make any effort to find work. Moreover, Gary Weimholt, a vocational rehabilitation consultant, reviewed claimant's list of job contacts and concluded claimant did not make a sufficient number of job contacts per week to constitute a reasonable effort to find a job. The Board agrees. Consequently, a post-injury wage should be imputed.

Mr. Weimholt was the only vocational expert to offer an opinion on claimant's post-injury capacity to earn wages. He opined claimant retained the ability to earn between $10 and $12 per hour or $400 to $480 per week. In addition, Mr. Weimholt opined that claimant's fringe benefits would be from 25 percent to 30 percent of the salary. When compared to the claimant's fringe benefit percentage while working for respondent the Board finds Mr. Weimholt's higher estimate overly optimistic and accordingly, the Board adopts the 25 percent. The Board imputes a post-injury base wage of $400 per week and further determines claimant would receive additional compensation (fringe benefits) totaling $100 per week for an imputed post-injury wage of $500. When the imputed wage is compared to claimant's stipulated pre-injury wage of $593.86, it is determined claimant has suffered a 16 percent wage loss.

Turning to the task loss component of the work disability formula, claimant was referred to two vocational experts for an evaluation of his employment history, including what tasks he performed over the 15 years preceding his accidental injury. Dr. Zarr reviewed the task list prepared by Mr. Weimholt and concluded claimant suffered a 36 percent task loss. Dr. Koprivica reviewed the task list prepared by Michael Dreiling and concluded claimant suffered a 69 percent task loss. The Board has considered this evidence and concludes that neither task loss opinion is more persuasive than the other and as such, it will average the two. Consequently, the Board finds claimant has suffered a 53 percent task loss.

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[10] *Id.* at Syl. ¶ 4.

Averaging claimant's 16 percent wage loss with his 53 percent task loss results in a 34.5 percent work disability. As previously determined, claimant suffered a 12.5 percent preexisting disability. Consequently, claimant is entitled to a 22 percent work disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated September 30, 2005, is modified to find claimant suffered a 22 percent work disability.

The claimant is entitled to 29 weeks of temporary total disability compensation at the rate of $383 per week or $11,107 followed by 88.22 weeks of permanent partial disability compensation at the rate of $383 per week or $33,788.26 for a 22 percent work disability, making a total award of $44,895.26 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephen C. Mayer, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director